Service Date: April 23, 2001

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA
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| IN THE MATTER OF US West Communications Introduction of Tariff Transmittal 00-04 "Competitive Response Tariff" | ) ) ) | UTILITY DIVISION DOCKET NO. D2000.2.21 ORDER NO. 6250b |

# FINAL ORDER

## Appearances

FOR THE APPLICANT:

MICHAEL F. McMAHON, appearing on behalf of Qwest Communications, Hughes, Kellner, Sullivan and Alke, 40 West Lawrence, Suite A, P.O. Box 1166, Helena, Montana 59624-1166.

FOR THE INTERVENORS:

SUSAN CALLAGHAN, appearing on behalf of Touch America, 40 East Broadway, Butte, Montana 59701.

THOMAS MURI, appearing on behalf of Montana Consumer Counsel, 616 Helena Avenue, P.O. Box 201703, Helena, Montana 59620-1703.

APPEARING BEFORE:

VICE CHAIR NANCY McCAFFREE, COMMISSIONER BOB ANDERSON, and COMMISSIONER GARY FELAND
Montana Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601.

COMMISSION STAFF:

ROBIN McHUGH, Staff Attorney
JAY DRISCOLL, Staff Economist

## Introduction

1. On February 8, 2000, U S WEST[1] (n/k/a Qwest Corporation) filed Tariff Transmittal 0004, titled "Competitive Response". If implemented the tariff would allow Qwest to offer incentives in the form of waivers and/or bill credits to residential and business customers who have disconnected from Qwest for an alternate local exchange provider and wish to return to Qwest.

2. In the past, Qwest has proposed and offered (when approved) a tariffed response to competition that is similar to this offering. These offerings are often referred to in the industry as "winback" or "competitive response". Prior to this filing, winback has been offered in select areas and statewide as a time limited promotion, usually for 90 or 180 days. This filing, however, seeks statewide and permanent status.

## Procedural Background

3. The Montana Commission received Qwest's Competitive Response offering on February 8, 2000. The Commission rejected the offering on March 15, 2000. On April 4, 2000 Qwest filed for reconsideration citing procedural arguments.[2] On April 11, 2000 the Commission granted Qwest's motion for reconsideration in part and directed staff to establish a procedural schedule, but denied Qwest's request to approve the filing. On April 21, 2000 the Commission issued a procedural schedule. A hearing was held on November 21, 2000. A briefing schedule was established culminating with Qwest's reply brief filed on January 29, 2001.

4. Sprint Communications, the Montana Consumer Counsel (MCC), and Touch America (TA) formally intervened in the case. Essen Communications (Essen) filed several letters with the Commission opposing the filing. Qwest, MCC and TA were the only parties to file comments and actively participate in the case.

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[1] Throughout this memo the names US West and Qwest will be used interchangeably.

[2] Qwest argued the decision violated, among other rights, its right to a fair hearing on the matter because no intervenor opposed the filing. Qwest argued the Commission violated the Montana Administrative Procedures Act (MAPA), and requested the Commission reverse its decision and approve the filing.

**Summary of Testimony and Arguments**

**Qwest Direct**

5. Qwest presented the prefiled testimony of Mr. David L. Teitzel and Mr. John Alke. Mr. Teitzel testified on 1) a description of the filing; 2) the status and effects on competition in the local and intraLATA toll market; and 3) potential customer impacts. Mr. Alke testified on the legal and public policy issues with specific emphasis on how § 69-3-305, MCA, should be interpreted and applied in this docket.

6. Mr. Teitzel asserts competition exists in Montana's local exchange market and points to Qwest's competitive loss as evidence. Alternate providers are making inroads in the local and toll markets and this offering will allow Qwest to compete "more aggressively" for lost business. (Teitzel Direct p. 11). Similar programs are utilized elsewhere in the telecommunications industry as a means to attract new and former customers and Qwest cites interexchange carrier (IXC) marketing where competitors offer end-users cash incentives to switch back as proof that this type of program already exists in the telecommunications industry. (Teitzel Direct p. 10).

**Program Overview**

7. The incentives offered to residential and business customers differ, with larger bill credits and waivers afforded to customers with larger service accounts. The following is a brief description of the offering.

8. The residential component provides incentives in the form of waivers for recurring and non-recurring charges for customers returning to Qwest. Returning customers will receive a waiver of the current non-recurring charge, up to two months of recurring rates, or both. The waivers are applicable to 1FR, Measured Exchange Access, Custom Calling Services, Directory Listings, Custom Ringing, Voice Messaging and intraLATA toll. The maximum amount waived cannot exceed $100 per account for local exchange service and $50 for intraLATA toll service. The incentive will only be offered upon a customer's initial return to Qwest. For example, a residential customer with caller ID and 400 minutes of intraLATA toll

use would receive a waiver of the non-recurring charge ($26) and up to two months recurring 1FR charges (2 x $16.73) plus a $3 waiver of an intraLATA calling plan, for a total of $62.46.[3]

9. The business component waives both recurring and non-recurring charges, in the form of bill credits, for a wide range of services. Services include: 1FB, Stand-by Line, Voice Messaging, Custom Calling, Hunting, Centrex21, Caller ID, DSS, DS1 service, Private Line (analogue), 800 Service Line, Market Expansion Line, Directory listings, and intraLATA toll.[4] Total waiver may not exceed the value of the nonrecurring charges and/or two months service of the monthly rates. For example, a business customer returning to Qwest who subscribes to Custom Choice would receive a maximum waiver of up two months of the monthly recurring charge (2 x $34.21), a waiver of the NRC ($61.40) plus up to a two-month waiver of the RC of custom choice (2 months x $15.74), for a total of $161.30. Unlike the residential component, business customers are obligated to sign a one-year contract with Qwest or be subject to early termination charges equal to the value of the incentives received.

10. For residential and business customers intraLATA toll is regarded separately from their return to Qwest local exchange service. In its testimony Qwest stated that it would not market competitive response to those customers that have switched away only their intraLATA toll service to another provider, but would offer incentives for both local exchange and intraLATA toll.

11. Qwest believes the offering is not a retail service, but rather is a "permanent marketing program" designed to compete for lost customers. (Teitzel Direct p. 7). However, it will be made available to competitors on a resale basis. (Teitzel Direct p. 8).

12. Qwest will only proactively market the program to those customers that have a "good credit history." (Id.) If bad credit customers request to come back to Qwest they will be offered the incentives, but required to make a deposit. (Id.)[5] The incentive structure is designed such that "similarly situated" customers will receive "comparable incentives" (i.e., high revenue

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[3] See Qwest's response to data request TA-7(b).
[4] See Teitzel Direct, pp. 6-7. It is interesting to note that while applicable services are outlined in the residential section of the tariff the applicable business services are only outlined in Teitzel's direct testimony and do not appear in the proposed tariff.
[5] See also, response to PSC-12 (d).

customers will be offered larger incentives while lower revenue customers will be offered lower incentives).[6]

13. Qwest asserts the winback program is self-sustaining and no subsidization will occur as a result of the offering (p. 9).[7]

14. The Montana local exchange and intraLATA toll markets are competitive because CLECs have been successful winning residential and business customers from Qwest for local exchange and toll service. (Teitzel Direct p. 2). Teitzel cites the 210 registered carriers and 63 interconnection and resale agreements on file with the Commission as evidence of competition.

15. Competition exists at the local exchange level in Montana as evidenced by the competitive losses Qwest has been able to track. From 1997 through June 2000 Qwest claims to have lost approximately 4,500 residential and 4,300 business local exchange lines to competitors. (Teitzel Direct p. 3). These losses are underestimated because customers are not obligated to identify why they disconnect from Qwest.

16. Mr. Teitzel describes the consequences of losing customers. First, lost revenue and, more importantly, the ability to market new products and services to customers. Second, lost lines "increase" the average cost of providing service, thus putting pressure on the local exchange rates for remaining customers. (Teitzel Direct p. 4). Third, lost revenues reduce the subsidy pool that has traditionally been used to "maintain affordable residential rates." (Id.)

17. Qwest's second witness was John Alke. Mr. Alke believes that Commission consideration of this filing should begin with a correct interpretation of the relevant statues followed by a proper delineation between statutory authority and public policy. (Alke Direct p. 2).

18. Mr. Alke opens with a history of § 69-3-305, MCA. He asserts § 305 addresses only tariff deviations and not price discrimination contained in § 69-3-321. Section 69-3-305(5) authorizes a telephone utility to unilaterally deviate from a Commission approved tariff under

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[6] Qwest submitted a proprietary exhibit outlining how its customer service personnel will offer the incentives to lost customers. PSC-15(a), Exhibit A, depicts a grid that Qwest marketing personnel will use to offer customers incentives to return to Qwest. The grid depicts the products and services available under the program as well as the allowable amount of waivers/credits offered customers falling within these guidelines.

[7] While not disputing this claim, the MCC states, "[t]he question [cross-subsidization] can not be answered without long run data" and analysis of the programs should answer the question "does the program cover its costs in the long run…?" (See PSC-22(c) and PSC-20).

certain limited circumstance. (Alke Direct p. 5). Neither § 69-3-305(5) nor any other statue within the Commission's enabling legislation provides substantive standards that limit the Commission's discretion in establishing price differentials in approved rate structures. Price differentials are at the Commission's discretion under the "just and reasonable" standard found in § 69-3-201. Mr. Alke cites to the current 1FB/1FR price differential as an example of the Commission's discretion under this section.

19. Mr. Alke warns that § 69-3-305 applies to all regulated utilities doing business in Montana; therefore, if the Commission believes itself to re-interpret this section of law it needs to keep in mind that its decision will not only affect Qwest but every other regulated utility in Montana. (Alke Direct, pp. 4-5). The Commission's legal authority to authorize flexible pricing in no way flows from § 69-3-305(5). In fact, the Commission began authorizing pricing flexibility for utilities other than Qwest long before the 1991 subsection was enacted. If the Commission denies Qwest's request on the basis that it violates Montana law then previous decisions granting similar pricing flexibility are "unlawful." (See response to PSC-17(c)).

20. In the context of permanent rates the "unfairly discriminatory" language in § 69-3-305(5)(c) is insignificant because the provision addresses temporary tariff deviations and not the Commission's ratemaking authority.[8] Authority to establish price differentials in tariffs based on a system of pricing flexibility solely rests with the Commission. No provision in the Commission's enabling legislation prohibits a regulated company from requesting this authority and no provision prohibits the Commission from granting such authority. In fact, the Commission's enabling legislation "clearly favors" a more "market oriented" approach to pricing and service. (Alke Direct pp.6-7).

21. Setting the flexibility to a range of tariffed rates assures any aberration would violate the anti-deviation statue and subject the company to penalty. The Commission has consistently rejected the argument that pricing flexibility violates the anti-discrimination provisions contained in § 69-3-321. Mr. Alke cites a 1987 MDU gas case as an early example

[8] Section 69-3-305(5)(c) allows the Commission to determine the appropriate scope of promotions while also allowing a determination if the promotion is "unfairly discriminatory." If the Commission determines that the promotion is unfairly discriminatory, costs incurred or revenues foregone will be below the line.

where the Commission allowed price flexibility on MDU's transmission service.[9] Mr. Alke acknowledges the MDU case was an energy decision; however, if under Montana law prior to 1991 an energy utility can flexibly price its regulated tariffed services "so can a telephone utility." (Alke Direct p. 9). The enactment of § 69-3-305(5), MCA (1991), did not take away the Commission's authority to grant flexible pricing; rather, it addresses short term promotional pricing – not the issue here.

22. The proper delineation between the legal and public policy concerns in this case boils down to whether the Commission feels this tariff is in the public interest. It is clear that the Commission is not prohibited from granting this application; rather, the question is whether it is in the public interest to let Qwest compete with competitors for lost customers. Mr. Alke ends by stating the Commission should approve the filing because it is good public policy and there is no legal prohibition against approval. He also suggests the Commission could resolve long run concerns by sunsetting the tariff. (Alke Direct p. 11).

## Intervenor Testimony

### Montana Consumer Counsel

23. Allen Buckalew testified on behalf of the Montana Consumer Counsel (MCC). He concluded that end-users will benefit from Qwest's winback proposal because they will be able to choose the provider they prefer "without having to incur charges for changing telephone service providers." (Buckalew Direct p. 6). Without this program the customer may be content to stay with another company in order to avoid connection and disconnection charges associated with changing carriers. Because the offering is limited to a customer's initial switch back this "curbs" potential abuse and limits the exposure of Qwest's regulated customers while giving the company a new marketing tool. (Buckalew Direct p. 7).

24. Mr. Buckalew feels the offering is competitively neutral, thus appropriate.[10] As long as the program is monitored and the company complies with the terms of his proposal (discussed below) he "do[es] not see a reason to disagree with Qwest's proposal." (Id.)

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[9] See D87.1.8 et al., Order 5379. Mr. Alke argues the Commission decision in that docket held that flexible pricing was not unjustly discriminatory and that public policy favored it as a competitive response.
[10] See response to PSC-22(d).

25. Mr. Buckalew contends an assessment of competition would be "useful" in analyzing the status of competition in the Montana markets; however, competition is not the real issue here. Rather, he argues, the question is: can Qwest promote its services similar to a competitor? The program allows Qwest the ability to compete much the same way as its competitors do in providing incentives to customers to switch back, particularly in the toll market.

26. Mr. Buckalew asserts it would be an arbitrary decision to limit the competitive offering to specific areas in the state where losses have occurred. However, "[i]f the Commission is concerned that Qwest will destroy the competitive alternatives that exist, it may want to limit where Qwest can offer the tariff." (Response to PSC 23(b)). He did not elaborate how this ought be accomplished.

27. Mr. Buckalew recommends the filing be monitored to make sure that Qwest does not "crush" competition and that cross-subsidization does not occur.[11] If it is determined that abuse is occurring the Commission should "step in" and make that determination. Regulated ratepayers exposure to the offering should be limited so that ratepayers are not held responsible for the program cost. Incentive waivers must be funded from revenues generated by re-obtaining the original customer, the program must be self-sufficient and independent of revenues from other services for support.

28. Mr. Buckalew suggests separate records be kept for the program. Specifically, Qwest should be required to keep a database of all customers, separated by class, who have received incentive waivers or credits. The database should track the following:

- Customer account information (i.e., name, address, account number and telephone number);
- Monthly value of incentives disaggregated by recurring and non-recurring charges;
- List of services to which waivers/credits are applied;
- Monthly customer revenues generated under this program;
- Annual summary of the net effect of the program; and
- A tabulation of the success rate of the program.

[11] Mr. Buckalew asserts that cross-subsidization concerns can not be answered in the short run, but long run data is needed to evaluate this phenomenon. In any event, Qwest's regulated ratepayers should never be asked to pay the costs of the offering. (See Response to PSC-22(c)).

29. Mr. Buckalew asserts the Commission should enforce the parameters outlined above and require Qwest to make a separate, annual filing tracking the program.

**Touch America**

30. John Fitzpatrick testified on behalf of touch America (TA). Mr. Fitzpatrick argued that competition in Montana's local exchange, and to a lesser extent toll market, has yet to develop; therefore, the tariff is unwarranted or at best "premature." (Fitzpatrick Direct p. 2.) A determination of the extent of competition in Montana has not been made and approval should be subject to Qwest's ability to secure Section 271 relief.[12] Qwest's own statistics demonstrate "competition does not really exist in the local access market in Montana." (Id.)

31. Mr. Fitzpatrick argues Qwest's own statistics indicate a loss of about 2 percent of its residential and 5 percent of its business access lines to competitors over the past three years. An accurate determination of the amount of competition should account for access line growth.[13] He points to these statistics which indicate access lines have actually grown 15 percent or 48,381 lines between 1995 and 1999, demonstrating net access line gain not loss as asserted by Qwest. (Fitzpatrick Direct p. 3.)

32. The loss of a few customers is not a true indicator of the extent of competition, and good public policy ought not warrant such a limited view. Mr. Fitzpatrick contends competition is a matter of degree where optimally the market would be served by a relatively large number of suppliers with similar market share and power. He concludes this is not the case in the telecommunications industry as a whole, and certainly not in Montana.

33. In defining the appropriate level of competition in the local exchange market, the Commission should try to emulate the IXC market before granting Qwest approval. When the local exchange and access markets have a "structure similar to the intraLATA toll market with *several* strong competitors offering service" it can be called competitive. (Response to PSC-27(a), emphasis added).

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[12] Section 271 of the 1996 Telecommunications Act requires Regional Bell Companies (RBOCs) to demonstrate to the Federal Communications Commission (FCC) that its local exchange market is open to competitors. Section 271 requires the RBOC to comply with a competitive 14-point checklist before interstate interLATA relief is granted.

[13] See response to PSC-25(e). A simple arithmetic calculation of access lines lost divided by total access lines by customer class yields the percentages cited here.

34. Mr. Fitzpatrick claims that Qwest is not losing larger revenue customers, something that is more significant than the actual number of lines lost. If systemwide revenue losses are divided by the total line loss, Qwest's annual revenue loss per business and residential access line ranges between 15 and 20 percent of average revenue per access line in 1999.[14] A Montana comparison is not available because Qwest did not supply the data. However, according to the response to PSC-27(c), 29% of Qwest's access line losses have occurred in Billings, 50-55 percent in rural areas and smaller towns with the balance (e.g., 15-20%) in the remaining "major cities". In general, and contrary to Qwest's testimony, access line losses have occurred in more rural, less metropolitan areas in Montana.

35. Mr. Fitzpatrick disputes Qwest's assertion that the 210 registered carriers is evidence of competition in Montana. For illustrative purposes, he contends that if Qwest's total lost lines (8,500) is divided by the number of carriers (210) each CLEC would average 42 customers. If the largest carrier is eliminated, the number rises to 250 access lines per CLEC.[15] Regardless of the amount, competition is not prevalent in Montana.

36. Qwest's claim that lost lines translate into additional pressure on local exchange rates is simply untrue. Evidence suggests losses have not been in larger metropolitan areas (discussed above) but in rural areas. Revenue loss leading to upward pressure on the presumed residential exchange rates is unfounded given access line losses have occurred in rural areas that cost more to serve and provide less revenue than the less costly more profitable urban areas. Mr. Fitzpatrick points to Qwest's response to TA-004 where Qwest's witness states access line losses "do not translate into cost increases." (Fitzpatrick Direct p. 7.)

37. Mr. Fitzpatrick contends access line losses do not translate into lost revenue. In fact, he argues, since a majority of competitive losses are to resellers, Qwest continues to receive roughly 82 percent of the revenues associated with the resale of access lines (i.e., the wholesale discount rate at 18.1%). Further, because losses occur in rural areas where revenues are low and costs are high, Qwest actually "benefits" from these losses. (Fitzpatrick Direct p. 8.)

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[14] In response to PSC-27(b) the 15 to 20 percent is calculated by dividing the proprietary revenue losses cited by Qwest in TA 01-002 by the line losses described in Qwest's response to PSC-008.

[15] The 250 access lines per carrier is calculated by taking the total number of access lines lost by Qwest and subtracting out the estimated access lines lost to Mid-Rivers and dividing the balance by 25 CLECs. That number (25) is comprised of the 23 CLECs with interconnection agreements and two small CLECs that have started CLEC operations.

38. Touch America predicts Qwest will offer winback on a very selective basis--targeted to the largest business and government accounts and not in rural areas where a majority of losses have occurred. The offering will serve two major functions. First, it will be used as a tool to stifle competition in lucrative markets, which will undercut CLEC marketing efforts. Second, Qwest will target intraLATA toll because "the money is in the long distance" market. (Fitzpatrick Direct p. 11.) Fitzpatrick argues 48 percent of the total revenue expected from winback comes from three toll revenue categories: the customer access line charge (CALC), intraLATA toll and switched access. He recommends that if the Commission is persuaded by Qwest's arguments it should be limited to the local exchange component and waivers for intraLATA toll and ancillary services should be "strip[ped] out." (Id.)[16]

39. In summary, the offering should be rejected because: 1) competition does not exist that warrants this offering; 2) losses are taking place in rural not urban areas; 3) economic injury does not exist or has not been proven; 4) intraLATA toll and ancillary services should not be part of the offering.

**Qwest Rebuttal**

40. Mr. Teitzel was Qwest's sole witness offering rebuttal. He agrees with Buckalew's monitoring plan recommendation. (Teitzel Rebuttal p. 1.) The remainder of his testimony addresses Mr. Fitzpatrick's testimony.

41. Competition is eroding Qwest's market share and TA's claim that competition does not exists is simply wrong. Losses "speaks to the existence of competition." (Teitzel Rebuttal p. 2.) Cited competitive loss figures (i.e., 8,500 lost lines) represent only one indicator of loss. Other indicators include wholesale activity, resold lines, LIS provisioned trunks, LNP, collocation activity and UNE provisioning; all of which point to increased competition. Additionally, 23 CLECs have purchased wholesale input elements from Qwest and three ILECs are, or soon will be, offering local access in Qwest exchanges. (Id.)

42. Contrary to Mr. Fitzpatrick's claim CLECs can gain market share very quickly. He points to Mid-Rivers' success in the Terry and Glendive exchanges as evidence of quick

[16] In response to PSC-28(c), Mr. Fitzpatrick states the ancillary services that should be rejected are "call waiting, call forwarding, three-way calling, caller ID, real deal, customer paging, privacy listings, voice messaging and so forth".

competitive erosion. If Qwest had been allowed to compete in these areas customers would have benefited because they could have tried an alternate competitor and returned to Qwest "without fear of economic repercussions" (Id.)

43. Although Mr. Teitzel acknowledges Qwest has gained access lines over the years, actual growth has declined over this same period and subsequently leveled off at approximately two percent per year. (Teitzel Rebuttal p. 4.)

44. Mr. Teitzel claims Mr. Fitzpatrick's revenue loss calculations of 15-20 percent are "erroneous" and "flawed" and should be dismissed (Teitzel Rebuttal p. 5), although he did not offer his own estimate. Qwest is losing larger customers to competition contrary to TA's claim, and confidential data (PSC-8) demonstrates losses to both large and small business customers.

45. Lost revenues associated with access line loss is not just the difference between wholesale and retail revenue. (Teitzel Rebuttal p. 6.) Rather, market entry 'sunk costs' associated with building a loyal and profitable customer base must be factored into any calculation on how access line loss affects Qwest.

46. Mr. Teitzel reaffirms that intraLATA toll waivers will be a component of this offering to both residential and business customers. However, Qwest does not intend to offer business customers waivers of intraLATA toll at this time, but reserves the right to make offers in the future. (Teitzel Rebuttal pp. 8-9, fn 3.)

## **Commission Discussion and Decision**

### **Duration of Tariff**

47. TA argued that Qwest should not be allowed to offer "competitive response" in areas where competition is not robust or does not exist. Allowing Qwest to offer incentives in areas where competition is slowly emerging may inhibit a competitor's ability to gain market share and truly compete with Qwest in the local exchange market. Qwest argued that competitors have made inroads into the local exchange market and the fact that the tariff cannot be offered unless a competitor wins a customer proves that competition is emerging and indicates the need for this competitive tool. The MCC addressed this point in its responses to the Montana PSC staff's data requests. Mr. Buckalew stated that a finding of Qwest's market share would be helpful in this filing, but stopped short of endorsing any market share analysis as a prerequisite to

Commission approval. In addition, the MCC also stated that restricting the offering in select areas would be arbitrary.

48. The Commission makes no determination on the extent of competition in the local exchange or the intraLATA toll market in this order. A determination of the status of competition in these two markets was not the focus of this filing. Rather, the Commission analyzed the merits of the filing and whether it is in the public interest to allow Qwest to implement this tariff.

49. The Commission is concerned about the impacts this filing may have on competitors and customers. As the filing states, business customers will be required to sign a 12-month contract with Qwest in order to receive the incentives for switching back to Qwest. If a business customer switches away from Qwest to another carrier during this one year term, the customer is subject to an early termination charge based on the amount of incentives received. Qwest uses the contractual obligation as a way to capture lost revenue in the event a customer decides to terminate its obligation to Qwest during this twelve-month period. The one year commitment required by business customers may be sound policy in that it allows business customers to participate in the offering and guards other regulated customers from having to assume lost revenues if business customers switch to another carrier after a short time with Qwest. However, without actual data the Commission has been unable to make any determination if cross-subsidization might occur under the terms of this filing. The MCC recognized the potential for subsidization, and, therefore, recommended the Commission monitor the program. The Commission endorses such a monitoring plan.

50. For residential customers the filing offers waivers much the same way the interexchange industry has enticed customers to switch long distance carriers. Residential customers will receive the benefits of the program the same as business customers, except that unlike business customers, residential customers are not required to sign a one year contract with Qwest in order to receive the benefits of switching back to Qwest. Rather, a residential customer could switch back to Qwest, receive the credits/waivers offered by Qwest, and then switch to a competitor the next month without being penalized.

51. The Commission is concerned that regulated residential customers might have to pay the costs for those customers that take advantage of winback (i.e., receive waivers/credits). As the MCC pointed out, this concern can be addressed by compiling long run data through a

monitoring plan that can be analyzed to study the competitive impacts “competitive response” might have on competition in the local exchange and long distance markets.

52. The Commission conditions its approval of the filing by requiring Qwest to submit the data as recommended by the MCC’s monitoring plan described at ¶28 of this order. The Commission finds monitoring the tariff is in the public interest and appropriate. Therefore Qwest is required to make a separate filing tracking the program under the six conditions recommended by the MCC.

**Sunset Provision**

53. The Commission finds, given the concerns about long run impacts discussed herein, that this tariff should contain a sunset provision. In its direct testimony, Qwest suggested that if the commission were inclined to impose a sunset on the tariff, it should be for a period of two years. The commission finds a sunset provision is in the public interest because it should mitigate many of the concerns expressed by Touch America. However, the Commission finds that a one-year instead of the suggested two-year sunset is more appropriate in this case. At its discretion Qwest may request to extend the tariff beyond the sunset date. Such a request must contain the monitoring data discussed herein, and be filed no later than ninety (90) days before the sunset deadline.

## CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. Qwest is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. This order does not violate § 69-3-305, MCA, or other provisions of Title 69, MCA.

**ORDER**

THEREFORE, based on the foregoing, IT IS ORDERED

1. Qwest's tariff transmittal 00-04, "Competitive Response," is approved effective on the service date of this Order, and for a period of one (1) year thereafter.

2. If Qwest intends to request that "competitive response" be extended past the sunset date as indicated in this order, it must monitor the "competitive response" program as discussed herein, and provide the data along with a request to extend no later than ninety (90) days before "competitive response" sunsets pursuant to this order.

DONE AND DATED this 28th day of March, 2001, by a vote of 3-2.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman, Voting to Dissent

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner,
Voting to Dissent

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
Commission Secretary

(SEAL)

NOTE: This order is a final order. A majority of Commissioners making the final decision did not hear this case. Therefore, any party was entitled to a proposed order. § 2-4-621(1), MCA. Each party has waived a proposed order by written stipulation pursuant to § 2-4-622(2), MCA. Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days of the service date of this order. See ARM 38.2.4806.